No. 93-37

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

TODD ALLEN DIMMIG, Petitioner,

-Vs-

ROBERT "Pete" WAHL, individually and as Sheriff of LaSalle, County, Illinois, a body politic, Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

WHETHER THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT VIOLATED FREEDOM OF SPEECH AND DUE PROCESS OF LAW IN EXPANDING UPTON -V- THOMPSON, 930 F.2d 1209 (1991) TO INCLUDE POLITICAL IN-ACTIVITY AS AN APPROPRIATE CONSIDERATION WHO WILL SERVE AS A DEPUTY SHERIFF IN VIOLATION OF DEPUTY'S RIGHT TO SPEAK FREELY AND THE RIGHT TO REFRAIN FROM SPEARING AT ALL THROUGH WORDS OR ACTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS?

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REPLY TO BRIEF IN OPPOSITION

Petitioner, TODD ALLEN DIMMIG, respectfully requests that this Court deny Respondent's Brief in opposition, and grant Petition for Writ of Certiorari seeking review of the Seventh Circuit Court of Appeal's opinion in DIMMIG -V- WAHL, 983 F.2d 86 (7th Cir. 1993).

STATEMENT OF THE CASE

The petitioner, a deputy for the LaSalle County Sheriff's Department, filed suit pursuant to **42 U.S.C. Section 1983** against **ROBERT "Pete" WAHL**, individually and as Sheriff of LaSalle County, alleging he was improperly discharged for his refusal to actively campaign for Wahl in violation of his First and Fourteenth Amendment Rights (P. App. 2,6).

Respondent, **ROBERT "Pete" WAHL**, moved for and was granted judgment on the pleading, the district court dismissed the action in its entirely (P. App 6-8).

Petitioner appealed the dismissal of his action to the Seventh Circuit Court of Appeals. The Court of Appeals Affirmed the decision of the district court (P. App 1-5).

On April 15, 1993 Petitioner was granted an extension of time within which to file a Petition For Writ Certiorari until June 5, 1993 (P. App 9). Petition for Writ of Certiorari was filed pursuant to that extension of time.

On or about August 10, 1993, Respondent

filed his brief in opposition.

REASONS WHY RESPONDENT'S BRIEF IN OPPOSITION SHOULD BE DENIED

I.

THE SEVENTH CIRCUIT COURT OF APPEALS HAS EXPANDED UPTON -V- THOMPSON BEYOND REASON REQUIRING ISSUANCE OF WRIT OF CERTIORARI FOR SPECIAL AND IMPORTANT REASONS.

In the instant case Petitioner contends that the expansion of **UPTON -V- THOMPSON**, 430 F.2d 1209 (1991) cert. denied, 503 U.S. __ 112 S.Ct. 1262, 117 L.Ed. 491 (1992) goes beyond reason and violates his right to speak freely and his right to refrain from speaking at all under the First and Fourteenth Amendments.

Respondent contends in his brief in opposition that **UPTON** allows sheriffs to discharge deputies for political requirements. However, **UPTON**, prior to this case, emphasized and focused on the political activity of deputy sheriffs against sheriffs. The political activity against the sheriff was the basis in the determination who would serve as a

deputy, whether the political activity could hinder the effective performance of the sheriff's office. The Court of Appeals has now expanded **UPTON** to include as an appropriate political consideration political in-activity in determining who will serve as a deputy sheriff. Additionally, **UPTON** is still unclear as to whether the holding applies only when deputies are politically active, or whenever they have political allegiances that differ from those of their superiors. At any rate, the Court of Appeals holds that under the First Amendment as interpreted....a sheriff may use political considerations when determining who will serve as deputy sheriff." Id. 430 F.2d 1218. In the instant case, the refusal of Petitioner to actively campaign on behalf of Wahl for Sheriff was included within the boundaries of appropriate political considerations that can lead to discharge. It is in this manner that the holding in this case carries **UPTON** to far, the sheriff may now use **UPTON** as a tool to compel speech in the form of political activity from his deputies. This result is strongly repugnant to First Amendment jurisprudence: **WEST VIRGINIA BOARD OF EDUCATION -V- BARNETTE**, 319 U.S. 624, 63 S.Ct. 1178, (1943) (P. at 6,7,9,10,16,17,18).

It is the compelling of speech in this manner that is at question in this case.

In **ELROD -V- BURNS**, 427 U.S. 347, 96 S.Ct. 2683, 49 L.Ed. 2d. 547 (1976), (P. at 15) the distinction was the discharge or threatened discharge of the plaintiffs because they were not affiliated with or sponsored by the Democratic party, not political activity/ in-activity against the party in power. In **BRANTI -V- FINKEL**, 445 U.S. 507,100 S.Ct. 1287, 63 L.Ed. 2d. 574 (1980), (P at 16) the plaintiffs were discharged because they were Republicans and the public defender was a Democrat, again not for political activity/in-activity against the party in power. In **RUTAN -V- REPUBLICAN PARTY OF ILLINOIS**, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed. 2d 52 (1990) the allegations were that plaintiffs had been denied promotions or jobs because they had not supported the party in power, similarly not for political activity/in-activity.

In each of these cases (**Branti; Elrod, Rutan**) the focus or emphasis of the political consideration is not explicitly activity against a party nor is it explicitly political in-activity. In **UPTON** the focus or emphasis was on the political activity against the sheriff. In this case the focus or

emphasis is on the political in-activity, resulting in the expansion of **UPTON** and the compelling of speech in the form of political activity. This result gives rise to a grave constitutional question as to the constitutionality of that compelling of speech.

Since a substantial constitutional question has been presented, the Respondent's brief in opposition should be denied and the Writ of Certiorari should issue.

II.

RESPONDENT'S BRIEF IN OPPOSITION RAISES QUESTION OTHER THAN QUESTION PRESENTED FOR REVIEW IN ORIGINAL PETITION FOR WRIT OF CERTIORARI.

In the instant case Respondent raises the question of whether **UPTON** has been applied correctly (R.B. at i). Respondent's question not only raises an additional question but also changes the substance of the question already presented.

Although Respondent is not required to adhere to the identical wording of the question already presented, he may not raise any additional question or change the substance of the question already

presented.

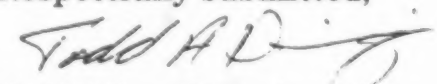
In case now before the Court, the question raised is clear and specific. The question is whether the expansion of **UPTON** violates the right to speak freely and the right to refrain from speaking at all, not whether **UPTON** has been applied correctly (P. at [i]).

Since Respondent has raised an additional question and has changed the substance of the question already presented, Respondent's brief in opposition should be denied and Writ of Certiorari should issue.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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